IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

JAY L. MARTS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 5:17-CV-00022**
	)	
EDGARDO CORTÉS, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF DEFENDANT EDGARDO CORTÉS' MOTION TO DISMISS

Defendant Edgardo Cortés,[1] in his official capacity as the Commissioner of Elections, by counsel, states as follows in support of his Motion to Dismiss the Plaintiffs' Complaint.

OVERVIEW OF THE CASE AS TO COMMISSIONER CORTÉS

The Plaintiffs, two Virginia citizens, challenge the constitutionality of certain actions taken by the Republican Party of Virginia. The Complaint contains no allegations against Commissioner Cortés, nor is there any relief requested against him. Accordingly, the Plaintiffs have no standing with respect to their claims against Commissioner Cortés. Furthermore, because the First Amendment prevents the Commissioner or any other state entity[2] from providing the requested relief, the Plaintiffs fail to state a claim upon which relief can be granted. Because the Plaintiffs do not demonstrate standing or state a claim upon which relief can be granted, Commissioner Cortés' Motion to Dismiss should be granted.

---

[1] While the Complaint refers to the Commissioner as "Edgardo Cortes," Commissioner Cortés would note that his surname is properly spelled with an accented "e" such that it reads "Edgardo Cortés."

[2] Throughout the Complaint, the Plaintiffs refer interchangeably to the "Virginia Department of Elections," of which Mr. Cortés is the Commissioner and the "Virginia Board of Elections." Pursuant to Virginia law, the Commissioner of Elections, the Department of Elections (Department), and the State Board of Elections (State Board) are legally distinct, *see* Va. Code §§ 24.2-101, 24.2-102, 24.2-103. Because the Department has not been served and the State Board has not been named as a party, only Commissioner Cortés is properly subject to the jurisdiction of the Court at this time.

BACKGROUND

In his official capacity as the Commissioner of Elections, Commissioner Cortés is tasked with "employ[ing] the personnel required to carry out the duties imposed by the State Board of Elections". Va. Code § 24.2-102; *see also* Va. Code § 24.2-101 ("'Department of Elections' or 'Department' means the state agency headed by the Commissioner of Elections."). The Department is the state agency through which the State Board "shall supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections." Va. Code § 24.2-103(A).

Virginia law defines political parties as "an organization of citizens of the Commonwealth which, at either of the two preceding statewide general elections, received at least 10 percent of the total vote cast for any statewide office filled in that election," and requires such organizations to have "a state central committee" and an elective office of state chairman, all of which must be "continually in existence for the six months preceding the filing of a nominee for any office." Va. Code § 24.2-101. Virginia Code § 24.2-508 *et seq.* establishes that:

> [e]ach political party shall have the power to (i) make its own rules and regulations, (ii) call conventions to proclaim a platform, ratify a nomination, or for any other purpose, (iii) provide for the nomination of its candidates, including the nomination of its candidates in the case of any vacancy, (iv) provide for the nomination and election of its state, county, city, and district committees, and (v) perform all other functions inherent in political party organizations.

Va. Code § 24.2-508. The RPV exercised this authority through its adoption of the RPV Plan, Pls.' Compl. at ¶ 7, which is not reviewed by, or otherwise controlled or influenced by, the Department, or the State Board, and certainly not the named Defendant, Commissioner Cortés. The Plaintiffs allege that sanctions meted out by party officials under the RPV Plan violate their rights under the

First Amendment, as well as their right to vote and to seek elected office, Pls.' Compl. at ¶ 60, but do not allege that Virginia law governs the content of the RPV Plan. Nor do the Plaintiffs allege that Commissioner Cortés, the Department, or the State Board have any role in enforcing the RPV Plan's provisions; in fact, the First Amendment itself prevents such state involvement in a political party's internal governance. *See, e.g.*, *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202-203 (2008); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 357 (1997); *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 233 (1989); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986); *Democratic Party of the United States v. La Follette*, 450 U.S. 107,121-22 (1981). Both Virginia law and Supreme Court precedent, then, are clear. The Commissioner, the Department, and the State Board have no authority over the internal governance of the RPV.

ARGUMENT

I. The Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1), because the Plaintiffs do not have standing.

a. Standard of Review

Article III of the U.S. Constitution "limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559 (1992). To meet the constitutional requirement of a 'case' or 'controversy,' "the party invoking the jurisdiction of the court must include the necessary factual allegations in the pleading, or else the case must be dismissed for lack of standing." *Bishop v. Bartlett*, 575 F.3d 419, 424 (4th Cir. 2009) citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)); *see also Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997) (citing *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990)) ("The party invoking the jurisdiction of a federal tribunal bears the burden of establishing standing."). To successfully demonstrate standing, the Plaintiffs must show that:

> (1) [the party] has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Bishop, 575 F.3d at 423 (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)) (alteration in original). There is also a prudential standing component, and when assessing this prudential component, "courts generally recognize three self-imposed constraints":

> First, "when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." Second, "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." Third, "a plaintiff's grievance must arguably fall within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit."

Id., 575 F.3d at 423 (internal citations omitted).

b. The Plaintiffs do not have standing with respect to Commissioner Cortés because they do not allege, nor can they show, that Commissioner Cortés caused their alleged injuries.

The Plaintiffs' Complaint contains no allegations that the Commissioner Cortés, the Department, or the State Board injured them. Instead, the Plaintiffs' only allegations of causation demonstrate that all injuries claimed by the Plaintiffs stem directly from the RPV Plan or from the actions of the RPV, its representatives, and local committees. While "general factual allegations of injury resulting from the defendant's conduct may suffice" at the pleading stage, *Lujan*, 504 U.S. at 561, the Plaintiffs fail to plead even general factual allegations of injury resulting from the conduct of Commissioner Cortés, the Department, or the State Board. As noted above, under Virginia law the authority to establish the rules and regulations governing a political party rests solely with the political party itself. Va. Code § 24.2-508. And despite the Fourth Circuit's clear admonition in *Bishop* that a "case must be dismissed for lack of standing" where a plaintiff does not include "the necessary factual allegations in the pleading," 575 F.3d at 424, the Plaintiffs plead no factual allegations that they were injured by Commissioner Cortés, the Department, or the State Board. Without such allegations, the Complaint must be dismissed as to Commissioner Cortés because the Plaintiffs fail to show *any* injury in fact caused by the Commissioner.

c. Nor can the Plaintiffs show redressability.

i. Virginia Code § 24.2-103 does not authorize the relief the Plaintiffs request with respect to the State Board.

While the Plaintiffs ask the Court "[f]or a writ of mandamus or other order directing the Board of Elections to monitor the Republican Party of Virginia to prevent the enforcement of Article I of the State Party Plan under Section 24.2-103 of the Code of Virginia," Pls.' Compl. at p. 12, the Plaintiffs failed to demonstrate that this requested relief can be granted. The Plaintiffs cannot show that § 24.2-103 empowers the State Board to redress the Plaintiffs' alleged injury by taking the requested action. Although the Plaintiffs allege that this statutory section authorizes the State Board to interfere in a political party's internal governance, the plain language of the statute clearly shows that this is not the case. Instead, § 24.2-103(D), by its plain language, authorizes the State Board only to petition a court "for a writ of mandamus or prohibition, or other available legal relief, for the purpose of ensuring that elections are conducted as provided by law." The Plaintiffs' alleged injuries do not involve the conduct of elections, but rather internal party governance and membership decisions. Section 24.2-103 cannot be applied as the Plaintiffs suggest.[3] This is no conduct of elections issue. Without a statutory basis for the relief requested as to Commissioner Cortés, the Department, or the State Board, the Plaintiffs fail to show redressability.

[3] As described in greater detail below, the Supreme Court's First Amendment precedent makes it impossible for Commissioner Cortés, the Department, or the State Board to exercise control over the RPV's internal party governance.

Where the Plaintiffs have entirely failed to demonstrate an injury in fact, causation, or redressability as to Commissioner Cortés, the Department, or the State Board, the Plaintiffs have failed to meet their pleading burden with respect to standing, this court lacks subject matter jurisdiction to hear their claim, and the Complaint must be dismissed as to Commissioner Cortés.

II. The Plaintiffs fail to state a claim upon which relief can be granted, and the Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

a. Standard of Review

A court evaluating a motion to dismiss under Rule 12(b)(6) must accept as true all of the factual allegations in a complaint, *Edwards v. City of Goldsboro*, 178 F.3d 231, 244 (4th Cir. 1999), but "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint's "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* at 678 (citing *Twombly*, 550 U.S., at 555). When faced with "conclusory allegations that amount to mere formulaic recitation of the elements of a claim," the Court must reject such allegations and "conduct a context-specific analysis to determine whether the well-pleaded factual allegations plausibly suggest an entitlement to relief." *Sarvis v. Judd*, 80 F. Supp. 3d 692, 697 (E.D. Va. 2015) (internal citations omitted). Conclusions of law in a pleading are not accorded the same leniency as factual allegations. *See Iqbal*, 556 U.S. 662, 678 ("Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we 'are not bound to accept as true a legal conclusion couched as a factual allegation.'") (quoting *Twombly*, 550 U.S., at 555).

b. The Plaintiffs fail to state any claim against the Commonwealth.

The Plaintiffs fall completely short of meeting the pleading standard established by *Iqbal* and *Twombly*. As described above, the Complaint is totally void of any allegation that they were harmed by Commissioner Cortés, the Department, or the State Board. The Plaintiffs failed to meet the pleading standard laid out in Fed. R. Civ. P. 8, and even failed to include in their Complaint the type of "unadorned, the-defendant-unlawfully-harmed me accusation" that the Supreme Court found insufficient in *Iqbal*. 556 U.S., at 678. Accordingly, it is apparent that the Complaint fails to state a claim with respect to Commissioner Cortés, the Department, or the State Board.

What's more, neither Commissioner Cortés, the Department, nor the State Board has legal authority to oversee or regulate a political party's internal governance as the Plaintiffs request. Pls. Compl., p. 12, ¶ (5). The Supreme Court described political parties' established self-governance authority in *Timmons v. Twin Cities Area New Party*:

> The First Amendment protects the rights of citizens to associate and to form political parties for the advancement of common political goals and ideas. *Colorado Republican Federal Campaign Comm. v. Federal Election Comm.*, 518 U.S. _, _, 116 S.Ct. 2309 (1996) (slip op., at 9) ("The independent expression of a political party's views is 'core' First Amendment activity no less than is the independent expression of individuals, candidates, or other political committees"); *Norman v. Reed*, 502 U.S. 279, 288 (1992) ("Constitutional right of citizens to create and develop new political parties….advances the constitutional interest of like-minded voters to gather in pursuit of common political ends"); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 214 (1986). As a result, political parties' government, structure, and activities enjoy constitutional protection. *Eu v. San Francisco County Democratic Central Comm.*, 489 U.S. 214, 230 (1989) (noting political party's "discretion in how to organize itself, conduct its affairs, and select its leaders"); *Tashjian*, *supra*, at 224 (Constitution protects a party's "determination…of the structure which best allows it to pursue its political goals").

520 U.S. 351, 357 (1997). While the Plaintiffs would have this Court order the State Board to take an active role in the enforcement of the RPV Plan, the Supreme Court has expressly directed that the States are permitted to do no such thing.

In fact, a State is prohibited from requiring a political party to adopt certain internal governance practices, or to accept as members individuals who do not meet its membership criteria. *See Timmons*, 520 U.S. 351, 357; *see also New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 202 (2008) ("A political party has a First Amendment right to limit its membership as it wishes…."); *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000) ("[T]he Court has recognized that the First Amendment protects 'the freedom to join together in furtherance of common political beliefs,' *Tashjian*, 479 U.S. at 214-215, which 'necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only,' *La Follette*, 450 U.S., at 122."); *Eu v. San Francisco Cnty. Democratic Central Comm.*, 489 U.S. 214, 233 (1989) ("[A] State cannot justify regulating a party's internal affairs without showing that such regulation is necessary to ensure an election that is orderly and fair."). As such, the State Board would run afoul of recognized constitutional limitations on state action were it "to monitor the Republican Party of Virginia to prevent the enforcement of Article I of the State Party Plan under Section 24.2-103 of the Code of Virginia" as the Plaintiffs request. *See* Pls. Compl., p. 12.

Where the Supreme Court has ruled unconstitutional state laws that interfere with political parties' self-governance, the Plaintiffs can hardly ask this Court to order the State Board, the Department, or Commissioner Cortés to act outside the bounds of the First Amendment's associational protections for political parties. Accordingly, the Plaintiffs have failed to state a claim as to Commissioner Cortés, the Department, or the State Board, and the Complaint should be dismissed.

CONCLUSION

The Plaintiffs allege that the RPV's Party Plan violates their rights under the First and Fourteenth Amendments of the U.S. Constitution. While the Plaintiffs ask this Court to declare this Plan unconstitutional, and issue a writ of mandamus requiring state election officials to monitor the RPV's action, the Plaintiffs fail to demonstrate standing to bring claims against Commissioner Cortés, or to demonstrate any constitutional right allegedly violated by Commissioner Cortés. Given these failures, the Plaintiffs' Complaint must be dismissed.

WHEREFORE, the Defendant Edgardo Cortés, in his official capacity as the Commissioner of Elections, requests that the Court dismiss the instant action as to him and to the Department of Elections and the State Board of Elections, with prejudice.

Respectfully submitted,

EDGARDO CORTÉS

By: /s/ - Anna T. Birkenheier
Counsel

Mark R. Herring
Attorney General of Virginia

Cynthia E. Hudson
Chief Deputy Attorney General

John W. Daniel, II
Deputy Attorney General, Commerce, Environment and Technology Division

Heather Hays Lockerman
Senior Assistant Attorney General

Anna T. Birkenheier (VSB # 86035)*
Assistant Attorney General
abirkenheier@oag.state.va.us

**Counsel for Edgardo Cortés in his official capacity as the Commissioner of Elections*

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 692-0558
Facsimile: (804) 692-1647

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that, on April 11, 2017, I am electronically filing the foregoing document with the Clerk of Court using the CM/ECF system and a copy of the foregoing document is being sent via first class mail to the following addresses:

Charles L. King, Esq.
Law Office of Charles L. King
116 G Edwards Ferry Road
Leesburg, Virginia 20176
Counsel for Plaintiffs

Cortland C. Putbrese, Esq.
Dunlap Bennett & Ludwig, PLLC
8003 Franklin Farms Drive, #220
Richmond, Virginia 20175
Counsel for Defendants Republican Party of Virginia, Inc.
and Frederick County Republican Committee

/s/ Anna T. Birkenheier
Anna T. Birkenheier (VSB # 86035)
Assistant Attorney General
Counsel for Edgardo Cortés in his official capacity as
Commissioner of Elections
Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
Telephone: (804) 692-0558
Facsimile: (804) 692-1647
abirkenheier@oag.state.va.us